

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RICHARD LONGORIA
Claimant

VS.

TYSON FRESH MEATS, INC.
Self-Insured Respondent

)
)
)
)
)
)
)

Docket No. 1,008,980

ORDER

Claimant requested review of the September 7, 2006 Award by Administrative Law Judge (ALJ) Pamela J. Fuller. The Board heard oral argument on December 5, 2006.

APPEARANCES

Randy S. Stalcup, of Wichita, Kansas, appeared for the claimant. Wendel W. Wurst, of Garden City, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, respondent had no objection to the Board's consideration of claimant's brief, filed with the Board on December 1, 2006.

ISSUES

The ALJ concluded the claimant failed to prove that his work of September 9, 2002 required more exertion than his usual work. She explained that "[t]he evidence showed that his work of that day, actually required less exertion, which is contrary to his testimony."¹ Accordingly, the ALJ found claimant's claim was precluded by K.S.A. 44-501(e) and his request for benefits was denied.

The claimant requests review of the following issues:

¹ ALJ Award (Sept. 7, 2006) at 8.

1. Whether claimant meet with personal injury by accident;
2. Whether claimant's alleged accidental injury arise out of and in the course of employment;
3. Whether claimant is entitled to temporary total disability benefits for the time periods of September 9, 2002 through February 1, 2003 and March 11, 2003 through March 14, 2003 and July 13, 2003 through July 20, 2003 for a claimed total amount of 26.71 weeks;
4. Whether claimant is entitled to the payment of her medical expenses and the unauthorized medical allowance; and
5. The nature and extent of claimant's impairment, including alleged work disability.

Claimant maintains that the job he was assigned on September 9, 2002 involved unusual exertion, in that he was required to repetitively lift 50 pound weights onto a scale. And as a result of that unusual exertion, he suffered a myocardial infarction and required a 5 level bypass. Because of the unusual exertion, claimant argues that his claim is not precluded by statute and that he is, therefore, entitled to a 40 percent impairment to the body as a whole as well as a 76 percent work disability, based upon a 100 percent wage loss and a 52 percent task loss.²

Respondent argues that the ALJ's Award should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed.

The ALJ set forth the pertinent facts, in great detail, in her Award and the Board adopts that statement as its own. Accordingly, only those facts necessary to explain the Board's findings will be referenced.

Resolution of this claim is governed by the provisions of K.S.A. 44-501(e). If the statute applies, then claimant is not entitled to any compensation and the ALJ's Award should be affirmed. If, however, the Board finds that claimant's heart attack was caused by something more than the claimant's usual work, and that exertion caused his resulting heart attack, then compensation is owed.

K.S.A. 44-501(e), known as the heart amendment, provides that:

² There are no other task loss or functional impairment opinions contained within the record other than those offered by Dr. Zimmerman.

(e) Compensation shall not be paid in case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee's usual work in the course of the employee's regular employment.

The goal of this statute is "not to deny compensation to claimants who suffer injury on the job, but rather to avoid requiring the employer to act as an absolute insurer of claimants whose death or disability was merely the result of the natural progress of disease and which coincidentally occurred at the workplace."³

The Kansas Supreme Court, in *Makalous*,⁴ addressed the language contained in K.S.A. 44-501 dealing with the "usual vs. unusual" dispute created by the so-called "heart amendment" to K.S.A. 44-501, stating:

"What is usual exertion, usual work, and regular employment as those terms are used in the 1967 amendment to K.S.A. (now 1972 Supp.) 44-501 will generally depend on a number of surrounding facts and circumstances, among which the daily activities of the workman may be one, but only one, among many factors.

"Whether the exertion of the work necessary to precipitate a disability was more than the workman's usual work in the course of his regular employment presents a question of fact to be determined by the trial court."⁵

Then more recently, the Supreme Court determined that the law requires the claimant to show "'that the exertion of the work necessary to precipitate the disability was *more than the [employee's] usual work* in the course of [the employee's] regular employment.'"⁶ And that a baseline for the claimant is necessary to establish what is *usual* so that a determination can be made as to what is *unusual*, "particularly when "[u]nusualness may be a matter of degree and may appear in the duration, strenuousness, distance or other circumstances involved in the work."⁷

There is no dispute that claimant sustained a heart attack while at his job on September 9, 2002. The ultimate question is, for purposes of K.S.A. 44-501(e), whether claimant established unusual exertion which precipitated his heart attack thus rendering

³ *Mudd v. Neosho Memorial Regional Med. Center*, 275 Kan. 187, 199-200, 62 P.3d 236 (2003).

⁴ *Makalous v. Kansas State Highway Commission*, 222 Kan. 477, 565 P.2d 254 (1977).

⁵ *Id.* at 481; citing *Nichols v. State Highway Commission*, 211 Kan. 919, Sly. 3 and 4, 508 P.2d 856 (1973).

⁶ *Mudd*, 275 Kan. 187, 192, citing *Nichols*, 211 Kan. 919, 923.

⁷ *Id.* at 192, citing *Chapman v. Wilkenson Co.*, 222 Kan. 722, 728, citing 1A Larson, *The Law of Workmen's Compensation* 38.64(a)(1973).

the heart amendment inapplicable. The difficulty here is that this event occurred on the first night claimant was assigned to train for his job duties as a scale tech, calibrating the scales. This activity normally required the worker to repetitively lift 50 pound weights onto a scale, loading the scale with 500 pounds. Once the scale's accuracy was confirmed, the weights would then be removed and the worker would move on to another scale, calibrating all four of the scales in the same manner. But on this day, claimant began suffering symptoms, at most, within 1-1/4 hours of the beginning of his shift. Thus, his "baseline" is somewhat limited. And there is a dramatic difference in claimant's recitation of events when compared to the testimony of the remaining witnesses.

Claimant had, up until September 9, 2002, worked the day shift performing rather sedentary work maintaining computer and electronic equipment. He had participated in the changing out of a platform scale, an activity that required claimant and another employee to lift a heavy scale (in excess of 100 pounds) and place it on a trolley for repair.

On September 9, 2002 claimant reported to work and clocked in just a few minutes before midnight. Claimant had worked the day before and at the end of his shift, he drove to Wichita to pick up some personal belongings. According to claimant, he was quite tired when he reported for work on this night. He met Tommy Turnbow and the two set out to begin his training. Mr. Turnbow testified that claimant told him he was tired because he'd had little sleep and had just arrived in town from Wichita.

According to Mr. Turnbow, he loaded the necessary equipment and retrieved the weights on a skid with the mechanized loader. He drove the loader to the first scale while claimant walked along side. They stopped at the first scale and Mr. Turnbow began setting up the equipment so that the weights could be placed in the basket. Tommy turned around and saw claimant holding one 50 pound weight in his hand. At this point, Mr. Turnbow told claimant that he would not be required to "throw" the weights but would learn the keyboard sequence first.⁸ Mr. Turnbow testified claimant lifted no more weights other than this one 50 pound weight.

After the first test print was run on the first scale, claimant asked Mr. Turnbow where the closest bathroom was as he was feeling sick. Claimant was directed to the bathroom and while he was gone Mr. Turnbow cleaned the first scale, which in his estimation took 15-20 minutes, and then he ran the balance of the tests. He then moved on to the next scale, but decided he would go check on claimant.

As he was walking to the restroom, he came upon claimant who said he was not feeling better. So the two of them returned to the tech shop and claimant was allowed to sit down. Mr. Turnbow returned to his scale calibration duties. He testified he still had 3

⁸ Turnbow Depo., Ex. 1.

scales left to calibrate. And each scale took at least 20 to 30 minutes to calibrate when he was not training a new scale tech.

According to claimant, he and Mr. Turnbow worked together to calibrate 3 scales before he became sick and excused himself to go to the restroom. He further testified that he alone lifted the 50 pound weights as many as 60 times during the course of helping to calibrate the 3 scales. But claimant also testified that he did not work after 12:30 a.m.⁹ After going to the restroom, he felt no better so he went back to talk to Mr. Turnbow and then proceeded to the tech room. He ultimately called his supervisor, Luther Britton, at approximately 1:15 or 1:30, and Mr. Britton decided that claimant should go to the hospital. A coworker was assigned to take claimant to the emergency room and the medical records indicate claimant arrived at the hospital at 2:10 a.m.¹⁰

In *Mudd*, the Supreme Court denied claimant's claim for benefits as it concluded that Mudd failed to establish the requisite baseline for her work and exertion. The act of running to a "code blue" was part of her job duties and there was no evidence to establish her claim that running to a "code blue" on that particular date was unusual. To the contrary, "Mudd's husband's testimony that she was required to run to code blues, coupled with the stipulation that she had responded to seven code blues during the 6 months before her stroke, strongly suggests this activity was not unusual."¹¹

Unlike the nurse in *Mudd*, this claimant had only been working for respondent a few weeks and at the time of his heart attack, he was engaged in a work activity that was obviously new to him, but was part and parcel of the job he was hired to do. So, setting aside the inconsistency of claimant's story when compared to that of the balance of the witnesses, it can fairly be said that *on that date* all of the tasks required of claimant were *unusual* in the sense that it was the first time he had been asked to learn how to calibrate the scales but *usual* in the sense that it was a regular part of his job duties for the job he was hired to perform.

The Board has considered the purposes behind the heart amendment and finds that the holding of *Mudd* and earlier cases which suggest that a baseline needs to be established, while good law, does not strictly apply to the instant set of facts. Because claimant had absolutely no history in this job it is difficult if not impossible to establish a baseline *for claimant* for purposes of determining whether his work on the date of accident was *unusual*.

⁹ R.H. Trans. at 39-40.

¹⁰ Benton Depo., Ex. 1 at 14 (Dr. Youngman's Sept. 9, 2002 Medical Report).

¹¹ *Mudd*, 275 Kan. 187, 193.

Looking at the remaining testimony of claimant himself, along with Tommy Turnbow, Eric Cersovsky, Art Gonzales and Luther Britton, it is clear that claimant was hired as a scale tech. And a scale tech is required to learn how to calibrate the scales. This process begins on the midnight shift and at first, all the trainee is compelled to do is watch and learn the keyboard. Only after the keyboard sequence is learned will the trainee move on to "throwing" the weights. But lifting the 50 pound weights was always part of the job and on the midnight shift, would be required during the process of calibrating the 4 scales, each time applying 500 pounds to the basket and removing that same 500 pounds. So, although claimant did not complete even one evening's work calibrating the scales, it was clearly anticipated that he would learn this aspect of the job and regularly work to calibrate the scales, either on the midnight shift, calibrating all the scales each night, or on demand during the day shifts.

Based upon this evidence, the Board finds that the baseline of work activities for a scale tech, as evidenced by the uncontroverted testimony of respondent's witnesses establishes that the work claimant was doing on the early morning of September 9, 2002 was not unusual. This finding is made regardless of which version of the facts are accepted. Even if one assumes claimant was accurate in his recitation of 60 separate lifts of the 50 pound weights, that was an activity that would normally be required of him when calibrating the scales.

Nonetheless, the Board finds the greater weight of the evidence supports respondent's version of the events and the Board believes it is more likely than not that claimant lifted only one 50 pound weight before falling ill. The Board makes this finding as it is simply too incredible to believe that claimant helped to calibrate 3 scales, lifting a 50 pound weight 60 separate times into and out of a basket, in the approximately 30 minutes he was on the job and working with Tommy Turnbow as claimant maintains he performed no work after 12:30 a.m., when he went to the bathroom.

Based upon the finding that claimant's work on September 9, 2002 did not involve unusual force or exertion, the claimant's claim is precluded by the heart amendment. The ALJ's Award is hereby affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated September 7, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
 Wendel W. Wurst, Attorney for Self-Insured Respondent
 Pamela J. Fuller, Administrative Law Judge